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IN THE MATTER OF THE APPLICATION OF WEST END WATER COMPANY FOR AN EXTENSION OF ITS CERTIFICATE OF CONVENIENCE AND NECESSITY.	DOCKET NO. W-01157A-05-0706 **APPLICANT'S RESPONSE BRIEF**

The Applicant, West End Water Company, hereby responds to the Closing Briefs of the ACC Staff ("Staff Closing Brief") and Intervenor City of Surprise ("Surprise Closing Brief"). The Applicant agrees with the substance and conclusions of the Staff Closing Brief. The Surprise Closing Brief fails to establish a legal or factual basis for denying the Application.

Request for Service

The parties fully developed and litigated the request for service issue through two hearings. Staff testified at the hearing and reiterated in its Closing Brief that there is a clear need for service in the area. [RT III at 166:22-24; Staff Closing Brief, at 2:22 ("Clearly, there is a need for water service in the extension area.").]

The Applicant's Closing Brief presented the most complete description of all the facts relevant to the request for service issue and whether the Applicant has proven a need for service. The Staff Closing Brief cites to W-01445A-06-0059 (Request for

Extension of CC&N by Arizona Water Company (the "AWC Casa Grande Extension Application")), wherein the importance and relevance of requests for service were also at issue. In that case, the requested extension area was greater than the area for which there was a demonstrated need for service. Here, the Expansion Area includes *only* that portion of Walden Ranch that will require service. There is no concern, therefore, about a possible "land grab" by the Applicant.

In the AWC Casa Grande Extension Application, just like in this case, a property owner expressly elected to remain neutral on the selection of water provider. (*See* Opinion and Order, W-01445A-06-0059, at 4, ¶ 5: "[T]he [State Land] Department stated that it wished to remain neutral on who the water provider would be.") Thus, a property owner's neutral position in that case was not a dispositive factor.

The AWC Casa Grande Extension Application case appears to confirm the opinion in this case of the Applicant's witness, Ray Jones. Mr. Jones testified at the May Hearing that a developer might have legitimate reasons for preferring to remain neutral in a dispute between potential water service providers. [Applicant Closing Brief, at 9.] Mr. Jones testified as follows:

> It's been my experience that the developers are simultaneously involved in not only negotiations with the water company, West End in this case, but with the City for sewer services. And the developers often feel like they're walking a tightrope between the two entities and that actions with one entity may result in negative consequences with the other entity. So they tend to try to do the minimum possible with either entity to get through the process. ... As this case evidences, you have the City of Surprise by its own admission and policies trying to control the private water companies in its planning area. And that's naturally a tension. And the developers, unfortunately, are the ones caught right in the middle of it, and they're the ones with all the money at risk.

[RT I at 179-180.]

Such a preference for neutrality occurred both in this case and the AWC Casa Grande Extension Application.

There is no question of fact regarding the developer's neutral position on the selection of a water provider for the Expansion Area. At the September Hearing, the developer expressly testified that he is "neutral" on the issue. [RT III, at 69:4-18.] He later confirmed his neutrality to Judge Bjelland: "I guess you just throw them both up against the wall and whoever wins wins." [RT III at 75:22-23.] On cross-examination by Surprise, the developer reiterated his neutral position: "I am willing to talk to any one or any entity that has water that can provide water however the agreements are made."

Statements at the County P&Z Hearing of September 7 Hearing were consistent with the developer's testimony in this proceeding, and also with Marvin Collins' and Ray Jones' testimony about the P&Z Commission hearing. Mr. Collins testified at the September Hearing: "Mr. Curley said to the Planning Commission that he had a will serve letter from the City of Surprise and they would have service with Surprise. [After some] further questions and comments from the Board, Mr. Curley at the end said he was okay with West End Water Company providing water service to the expansion area." [RT III at 137:4-10.]

Mr. Curley's statements to the County P&Z Commission were:

> So right now, the water situation is as follows, it's either going to be one or the other; it's either going to be the City of Surprise or it's going to be West End. That's going to be decided within the next couple of weeks. [*See* County P&Z 9/7/06 Transcript ("P&Z Tr.") at 14:18-22.]
> ...
>
> Well, as long as we get water, we're happy. And it's going to be one or the other. We prefer the City of Surprise, but we can live with West End also. [*Id.* at 15:6-10.]
> ...

> But the actuality is that it's going to be one or the other. [*Id.* at 16:17-18.]
> ...
>
> But at this stage, it's going to be one or the other. [*Id.* at 16:22-23.]
> ...
>
> I think in this case we don't know which one, but we can establish that there will be [a water provider], one way or another. [*Id.* at 23:12-14.]

In addition to telling the County P&Z Commission that the developer would accept service from either the Applicant or Surprise, Mr. Curley also stated that Surprise had specifically *requested* the developer's cooperation with their opposition to this Application: "The City of Surprise then came to us and said, Look, we have a problem with a lot of these private water companies. We're annexing up Grand Avenue. We would prefer to be the water provider. And we agreed." [P&Z Tr. at 14:18-22.] Thus, the fact that the developer has expressed any interest in Surprise at all, in any forum, is due to: (1) a specific request from Surprise, while the developer *depended on Surprise's support* for the zoning case and, specifically, sewer service; and (2) the fact that the County planning staff was concerned that Surprise's intervention could result in there being no water provider for the Expansion Area [*see id.* at 5-6].

In light of such pressure from Surprise, it is remarkable that the developer has remained neutral. But it has remained neutral. At the least, the developer's neutrality further supports Ray Jones' observations about why a developer might elect to remain neutral on such an issue. At the most, the developer's continuing neutrality could indicate the developer's resistance to Surprise's pressure tactics.

The P&Z staff's presentation to the County P&Z Commission also confirmed that there is *no current agreement between the developer and Surprise* to provide water service and, in addition, that Surprise has no current plan or ability to annex Walden

Ranch. Staff testified that: "The City of Surprise provided a letter ... [that] outlines their intent to provide *sewer services* [not water services] to the project, pending a pre-annexation service agreement. It also states they intend to initiate annexation of the site *when possible*." [*Id.* at 5:9-14 (emphasis added).] Thus, the statements made to the County P&Z Commission do *not* establish a factual basis for concluding that the developer, contrary to his sworn testimony at the September Hearing, prefers Surprise over the Applicant, but to the contrary, confirm the developer's neutral position and further confirm the lack of an agreement between the developer and Surprise for water service in the Expansion Area.

Factors for Consideration of an Extension Application.

The ACC Staff's Supplemental Report in the AWC Casa Grande Extension Application listed nine factors that the Staff considers in determining whether to recommend approval of a CC&N extension application. (*See* Staff Closing Brief, at 6-7; *see also* Opinion and Order, W-01445A-06-0059, at 6-7, ¶ 17.) In this case, the balance of the factors overwhelmingly favors approval of the Application:

1. Whether inclusion of the area could reasonably be expected to contribute to operational efficiencies. The Applicant's consultant, Ray Jones, testified to the efficiencies of unified service for all of Walden Ranch. Staff concurs with Mr. Jones' opinion. (*See* Staff Closing Brief, at 5: "Staff agrees that [granting the Application] will reduce confusion in the subdivision ....".) Increased efficiencies include less expensive initial infrastructure construction. (*See id.*: "Consequently the cost of the system will be lower without sacrificing service if West End is granted the CC&N extension.")

2. Whether exclusion of the area could reasonably be expected to result in operational inefficiencies. Surprise has no infrastructure near the Expansion Area. Therefore, no inefficiencies would result from granting the Application. To the contrary,

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allowing the Applicant to include the Expansion Area in the Applicant's Master Plan infrastructure is the most efficient way to provide regional water service.

3. Whether there is a competing application for the area. There is no competing application for the Expansion Area. Surprise's stated policy that it will oppose expansion of all private water companies in its General Plan Area is not an application. As discussed more fully below, Surprise's decision not to provide evidence and information related to its ability to serve means that the Commission must rely solely on Surprise's unsupported statements about its intention to serve in the area, with no supporting evidence.

4. Whether a customer in the area requests to be excluded and the nature of the request. There is no such request. To the contrary, the developer and its representative testified that either provider would be acceptable. The Surprise Closing Brief quotes a letter from a single customer, from 32 months ago, that was submitted in connection with the Walden Ranch P&Z case. [Surprise Closing Brief, at 7.] Of the 66 letters opposing the Walden Ranch zoning case, only one mentioned the Applicant. [*See* Ex. A-16, at 26 of 26 *et seq.*.] Moreover, the single letter quoted by Surprise acknowledged that, while the customer had earlier experienced water pressure concerns, "our water pressure is [now] normal." Thus, as of 32 months ago, the *single* issue of which that *one* customer complained had already been resolved. In addition, there have been no complaints against the Applicant filed with the ACC. [RT I at 38:15-17.]

Surprise failed to quote another letter of opposition in the P&Z case. That letter describes local opposition to Surprise's growth plans and indicates that Surprise's desire to eventually annex the Expansion Area may face opposition:

> Much of our community lies within the area covered by the City of Surprise's General Plan. At nearly every opportunity during public hearings, Wittmann-area residents have strenuously opposed Surprise's encroachment into this area.

> Surprise appears to have conceded to existing residents but is still aggressively pursuing vacant land in the area. Plans include housing density much greater than that which is currently rural zoning.

[Ex. A-16, April 5, 2004, letter signed by eight individuals.]

5. Whether the area is contiguous to the company's current service area. That the Expansion Area is contiguous to the Applicant's service area is undisputed.

6. Whether the requested area "squares off" the service area or fills in holes in the service territory. The Expansion Area reflects a need for service, not a geographic adjustment to the existing service area.

7. Whether the company at issue is financially sound. Although Surprise has attempted to disparage the Applicant on several grounds, including its finances, the Applicant has successfully completed a rate case, in which its finances were subject to Staff and Commission scrutiny. In addition, Staff recommends approval of the current Application based on all relevant factors.

8. Whether the company at issue is in compliance with Commission decisions, ADEQ and ADWR. The Applicant has proven such compliance, which is undisputed.

9. Other showings by the company at issue that it is in the public interest to approve the extension. The Applicant has proven that it has a Master Plan for development of a comprehensive water delivery system, which it has planned proactively in anticipation of growth that will occur within its existing service area. The anticipated growth includes developments other than Walden Ranch. In contrast, if the Expansion Area is served by Surprise, the residents in that area will not have even an electoral voice and will be subjected to service by Surprise with no regulatory recourse of any kind. [*See* Applicant Closing Brief, at 16-18.]

Because of the clear necessity for service, and the developer's interest in resolving the water provider issue as expeditiously as possible, the Commission should consider

that the developer's neutrality does not require "postpon[ing] any decision until the new owner of Walden Ranch informs the Commission that it has a preference regarding which entity should provide water service," as Surprise suggests. [Surprise Closing Brief, at 12.] The developer has already testified under oath to the ALJ that he is neutral. The issue in this case, therefore, is necessity, not preference. There is an undisputed need for service.

Surprise's Municipal Status.

Surprise believes that its municipal powers are such that it requires the Commission to "grant special deference to the City and its citizen-endorsed GPA." [Surprise Closing Brief, at 10.] Of course, the Commission cannot "grant special deference" to Surprise if such deference requires the Commission to abandon its own constitutional mandate. The Growing Smarter legislation does not govern the Commission, nor could it diminish the scope of the Commission's constitutional authority.

Surprise touts that its General Plan was "citizen-approved." [*Id.*] However, no one outside the municipal boundaries of Surprise was enfranchised to vote for, or against, the plan. This fact is significant because the vast majority of the General Plan Area consists of land outside the Surprise municipal boundaries. The residents and property owners of the unincorporated land did not vote to include their lands in the Surprise General Plan Area.

The above-quoted letter, signed by eight residents of County land outside of Surprise (but within the General Plan Area), illustrates that the General Plan is not a mandate approved by all interested parties. To the contrary, the letter expresses strong opposition to Surprise's imposition of a vast General Plan Area. Those individuals did not have a vote on the GPA. They will, however, have a statutory right to decide whether or not to sign an eventual annexation petition. *See* A.R.S. § 9-471 *et seq.* Therefore,

despite Surprise's bold statement that it "fully expects to annex" the Expansion Area, the City can neither predict nor guarantee when (or if) annexation will occur. [Surprise Closing Brief, at 5.]

The eventual water customers in the Expansion Area will lack a vote in municipal elections –the only form of regulation available to a customer of a municipal utility—unless and until annexation occurs. [*See* Applicant's Closing Brief, at 16-18.] Because annexation is not even "predictable," the Commission should not expose the Expansion Area to a complete lack of regulation for the unforeseeable future.

The municipal cases that Surprise cites to support its contention that the Commission should give "special deference" to Surprise because of the General Plan Area involved a court's deference to decisions of a municipal governing body *over which the governing body already had jurisdiction.* [Surprise Closing Brief, at 16-18.] The General Plan Area, however, is not a jurisdictional region. It is an organized wish-list.[1]

Surprise adamantly relies on its immunity from ACC regulation. [Surprise Closing Brief, at 13-18.] Surprise misses the point, however. While it is true that "Surprise had no obligation to submit a competing application to serve to the Commission because the Commission has no authority to judge the City's competence or authority to serve" [Surprise Closing Brief, at 16, n.7], the Commission also has no evidence on the record of this case to conclude that Surprise is ready or able to serve, or even to compare Surprise's qualifications to those of the Applicant.

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[1] The County has jurisdiction over the Expansion Area. That is why the Walden Ranch zoning case was heard by the County Planning & Zoning Commission. For the same reason, West End requested and obtained a County franchise to operate in the Expansion Area, not a franchise from the City of Surprise. Surprise admits as much in its Closing Brief: "Indeed, *were Walden Ranch within Surprise's corporate limits*, the Commission could not even issue an order preliminary pursuant to A.R.S. § 40-282(D) because that statute limits the Commission's authority when issuing such orders to situations where the public service corporation 'contemplates securing' the required municipality consent." [Surprise Closing Brief, at 15, n.6 (emphasis added).] Under current conditions, the restriction cited by Surprise has no bearing on this case. Although Surprise has aspirations for the Expansion Area, it has no lawful jurisdiction whatsoever in that area.

Surprise chose to attack the Applicant (even to attack the Applicant's sister company based on two complaints *by the same developer*, both of which are fully resolved), instead of presenting evidence of its own qualifications. Because Surprise voluntarily did not present evidence of its operations, rates, or capacity for financing future infrastructure, the Commission has no basis for concluding that Surprise is better qualified than the Applicant. The Commission has ample evidence, however, of the Applicant's ability to serve. It has no evidence related to Surprise. Consequently, on the record of this case, the Commission knows nothing about any of the following issues regarding Surprise:

- its rate-setting process and accounting parameters;
- its rate of return;
- the amount (if any) of rate-derived funds that Surprise uses for non-utility purposes;
- whether it has an infrastructure plan comparable to the Applicant's Master Plan;
- the number or nature of customer complaints, or the resolution thereof;
- how (if at all) Surprise intends to transition, eventually, away from its current contract with Arizona-American; or
- whether such transition will negatively impact water quality, service reliability, or customer service.

The imbalance of evidence of the parties' qualifications is important, because the Commission has an obligation to select the provider that is ready, willing and able to serve and that was the first provider in the region. The Applicant prevails over Surprise in every category. If the Commission compares the two providers, Surprise's side of the ledger is primarily a list of unknowns. In contrast, the Applicant's qualifications are known, supported by evidence, and have been verified and approved by Staff.

Integrated Water and Sewer Service

Surprise argues that it should be the water provider, because it alone can provide both water and sewer service in an integrated system. The Applicant has demonstrated, however, that Surprise *created* the legal impediment that prevents the Applicant from providing sewer service. [Applicant Closing Brief, at 14, n.3.]

Moreover, Surprise's implied ability to provide sewer service in the area is misleading. At the Maricopa County Planning & Zoning Commission hearing on September 7, 2006, Woodside Homes' zoning attorney, Michael Curley, explained to the Commission that Surprise originally opposed Walden Ranch (and other developments), because Surprise was incapable of building the necessary infrastructure to provide sewer service in the region. Mr. Curley further explained that the various developers with projects in the area worked together to plan a sewer system for the general area, which the developers will finance and construct. Surprise's sewer capability, therefore, appears to depend on whether all of the planned projects will be built. Moreover, Surprise appears to be incapable even of developing a master sewer plan on its own without developer support. [P&Z Tr. at 9-12.]

Like the evidence related to its water service, Surprise appears to have hoped or expected that the Commission would simply trust in Surprise's ability to build adequate sewer infrastructure and provide service. Such speculation should not occur, especially in light of (1) the fact that Surprise completely controls the playing field through the MAG 208 process, and (2) Mr. Curly's avowal to the County P&Z Commission that sewer in the general vicinity of the Expansion Area "essentially, financially, [is] a multimillion dollar proposition, and it's coming about as a result of [the developer's] efforts." [P&Z Tr. At 11:14-16.]

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Surprise's reliance on the *Woodruff* matter (Decision No. 68453) is also misguided. [Surprise Closing Brief, at 25.] There are two key differences between *Woodruff* and this case:

(1) *Woodruff* involved two competing *regulated* providers; this case is between one regulated provider and one, unregulated municipal provider; and

(2) The local municipality in *Woodruff* was willing to sponsor a provider for a 208 Amendment for immediate construction of planned sewer infrastructure. Surprise is unwilling to sponsor the Applicant as a provider and, therefore, holds all the cards on whether there will be a dual system in the Expansion Area.

Although, theoretically, integrated water and wastewater service may be preferable, Surprise has no current wastewater infrastructure close to the Expansion Area. The area would have dry pipes and septic, waiting for an undisclosed future date when Surprise *may* be able to hook the system into a larger system. [RT I at 113-114.] The possibility of an integrated system is, therefore, attenuated at best.

Surprise has already agreed to provide sewer service, at some point, to the Expansion Area (using infrastructure the developer has planned and will build), so Walden Ranch will receive sewer service regardless of the outcome of this case. Therefore, if Surprise eventually becomes ready to provide water service to the Expansion Area, and Surprise (following state law) condemns the Applicant's water infrastructure, then an integrated system will exist in the area. A decision in the Applicant's favor in this case, therefore, will not eliminate the possibility of an integrated system; rather it will respect the current law and assure an orderly progression of events based on fact, not speculation.

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DATED this 21st day of November, 2006.

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